No.

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied to institutionalization.

## PARTIES TO THE PROCEEDING

The petitioner in this Court is the United States of America, which intervened in the court of appeals, pursuant to 28 U.S.C. 2403, to defend the constitutionality of the abrogation of Eleventh Amendment immunity in Title II of the Americans with Disabilities Act of 1990.

The respondents are the Nebraska Department of Health and Human Services Finance and Support, the Nebraska Department of Health and Human Services, Stephen B. Curtiss, in his official capacity as the Director of Nebraska Department of Health and Human Services Finance and Support, and Ron Ross, in his official capacity as the Director of Nebraska Department of Health and Human Services, all of whom were the defendants below.

The private plaintiffs below are also respondents: Bill M., by and through his father and natural guardian, William M., and on behalf of themselves and all other persons similarly situated; John Doe, by and through his mother and natural guardian, Jane Doe, and on behalf of themselves and all other persons similarly situated; Heather V., by and through her mother and guardian, Marcia V., and on behalf of themselves and all other persons similarly situated; Jane S., by and through her mother and natural guardian, Patricia S., and on behalf of themselves and all other persons similarly situated; Kevin V., by and through his mother and legal guardian, Kathy V., and on behalf of all other persons similarly situated; Jennifer T., by and through her parents and legal guardians, Sharon T. and Greg T., and on behalf of themselves and all other persons similarly situated; William M., on behalf of his son, Bill M.; Jane Doe, on behalf of her son, John Doe; Marcia V.,

on behalf of her daughter, Heather V.; Patricia S., on behalf of her daughter, Jane S.; Kathy V., on behalf of her son, Kevin V.; Sharon T., on behalf of her daughter, Jennifer T.; and Greg T., on behalf of his daughter, Jennifer T.

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 408 F.3d 1096. The opinion of the district court (App., *infra*, 9a-10a) is unreported.

### JURISDICTION

The court of appeals entered its judgment on May 27, 2005. The petitions for rehearing filed by the United States and by the private plaintiffs were both denied on August 18, 2005 (App., *infra*, 11a). By order of November 4, 2005, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and

including December 16, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced at App., *infra*, 12a-33a.

## STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the ADA. 42 U.S.C. 12101(b)(4).

The ADA targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case arises under Title II of the ADA, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). Title II may be enforced through private suits against public entities. 42 U.S.C.

12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

Title II prohibits governments from, among other things, denying a benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii) and (vii). In addition, a public entity must make reasonable modifications in its policies, practices, or procedures if necessary to avoid the exclusion of individuals with disabilities, unless the accommodation would impose an undue financial or administrative burden on the government, or would fundamentally alter the nature of the service. See 28 C.F.R. 35.130(b)(7).[1]

2. The plaintiffs, Bill M., *et al.*, are individuals with mental retardation and other developmental disabilities and their guardians. They seek medical services from the State of Nebraska through programs that receive federal financial assistance under the Medicaid Act, 42 U.S.C. 1396 *et seq.* The plaintiffs allege, *inter alia*, that Nebraska is violating Title II of the ADA, as interpreted by this Court in *Olmstead* v. *L.C.*, 527 U.S. 581 (1999), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. II 2002), by offering plaintiffs medical services exclusively in institutional settings, when services could be provided in less restrictive community placements without fundamentally altering the nature of the State's medical programs or

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[1] Congress instructed the Attorney General to issue regulations to implement Title II, based on regulations previously promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. II 2002). See 42 U.S.C. 12134.

imposing an undue financial or administrative burden. App., *infra*, 2a-3a; U.S. C.A. Br. 4.

Plaintiffs sued the state agencies and officials responsible for administering the State's Medicaid program, seeking only declaratory and prospective injunctive relief. Nebraska moved to dismiss the plaintiffs' Title II claims against the state agencies on the ground of Eleventh Amendment immunity. The district court denied the motion. App., *infra*, 9a-10a.

3. a. Nebraska filed an interlocutory appeal, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993), and the United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of Congress's abrogation of Eleventh Amendment immunity.

The court of appeals reversed. App., *infra*, 1a-8a. Previously, the en banc Eighth Circuit had held that Title II, in its entirety, is not a valid exercise of Congress's legislative authority under Section 5 of the Fourteenth Amendment. *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. dismissed, 529 U.S. 1001 (2000). The court of appeals held that *Alsbrook* compelled dismissal of the plaintiffs' Title II claims on Eleventh Amendment grounds. App., *infra*, 6a. In so ruling, the court rejected the United States' argument that this Court's intervening decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), superseded *Alsbrook*. The court of appeals reasoned that "*Alsbrook* has been modified by *Lane*" only for "a discrete application of Title II abrogation—related to claims of denial of access to the courts." App., *infra*, 6a. The court also rejected the United States' argument that, because the identical relief against the identical state defendants in the same federal court is already available under the plaintiffs' Rehabilitation Act claim,

the court should avoid the constitutional question presented by Nebraska. See App., *infra*, 7a. The court held that "the existence of parallel claims is immaterial" when a State invokes its Eleventh Amendment immunity. *Ibid.*

Judge Colloton concurred. App., *infra*, 7a-8a. He recognized that *Lane* "undermined some of the reasoning of *Alsbrook*," but concluded that *Alsbrook* "still governs this case." *Id.* at 8a.

b. The court of appeals denied the United States' and the plaintiffs' petitions for rehearing and rehearing en banc. App., *infra*, 11a. Judges Murphy, Bye, and Melloy dissented from the denial of rehearing en banc. *Ibid.*

**REASONS FOR GRANTING THE PETITION**

1. The court of appeals has held an Act of Congress to be unconstitutional and, in so doing, has deviated from this Court's precedents.

a. In *Tennessee* v. *Lane*, 541 U.S. 509 (2004), this Court clarified the constitutional framework for analyzing exercises of Congress's Section 5 power and, employing that framework, held that Title II of the Americans with Disabilities Act (ADA) reflects a proper exercise of Congress's Section 5 authority as applied to the class of cases implicating access to the courts. The Eighth Circuit's holding that *Lane* overruled *Alsbrook*'s result as applied only to a "discrete" category of access-to-the-court cases (App., *infra*, 6a) ignores the analytical framework prescribed by *Lane* and the predicate holdings that underlie *Lane*'s judgment. Indeed, at the same time that the court of appeals refused to reassess its own circuit precedent to conform to *Lane*, the court acknowledged that "*Lane* may well presage the eventual rejection of *Alsbrook*'s

rationale." *Id.* at 6a n.3. That failure to reassess circuit precedent in light of the *reasoning* of an intervening Supreme Court precedent, where that reasoning was necessary to this Court's disposition, was clear error.

More particularly, in *Alsbrook*, the Eighth Circuit held that Congress lacked a sufficient record of discrimination to enact Title II. 184 F.3d at 1009. In *Lane*, however, this Court expressly held the opposite, ruling that Congress passed Title II in response to an "extensive record of disability discrimination," 541 U.S. at 529, and "of pervasive unequal treatment [of individuals with disabilities] in the administration of state services and programs, including systematic deprivations of fundamental rights," *id.* at 524. That aspect of *Lane* was not limited to the context of access to judicial services, but extended to the entirety of Title II. Indeed, the Court did not engage in any as-applied analysis (or cite its Section 5 as-applied precedent, *United States* v. *Raines*, 362 U.S. 17 (1960)), until the final section of the opinion addressing whether Title II is an appropriate response to the evidence of discrimination that the Court had already found to be sufficient. See 541 U.S. at 530-534.

Of particular relevance here, *Lane* found that the record of "unconstitutional treatment of disabled persons by state agencies" included "unjustified commitment," and other abuses in the "state mental health" system. 541 U.S. at 524-525. The Court further noted the specific congressional finding that unconstitutional treatment "persists" in such areas as "institutionalization." *Id.* at 529 (quoting 42 U.S.C. 12101(a)(3)). The Court accordingly held in *Lane* that it is "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation" under Congress's

Section 5 power. *Id.* at 529. *Alsbrook*'s holding—reaffirmed by the court of appeals in this case, App., *infra*, 6a—that Congress lacked a basis for exercising its Section 5 power to enact Title II is irreconcilable with that key underpinning of *Lane*.

*Lane* also held that, in analyzing Congress's exercise of its Section 5 power, courts must take account of the fact that Title II enforces *multiple* constitutional rights, 541 U.S. at 522-523. By contrast, *Alsbrook*, which the court of appeals treated as controlling in this case, was decided on the basis that Title II enforces only one constitutional right—the Fourteenth Amendment's Equal Protection Clause. 184 F.3d at 1008-1009.

This Court's holdings concerning the foundation for congressional legislation and the proper mode of analyzing the constitutionality of Title II's abrogation are just as binding on the Eighth Circuit as the bottom-line judgment in *Lane*. "When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which [this Court]"—and, *a fortiori*, the courts of appeals—"are bound." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 67 (1996).

The court of appeals' decision that it need not hew to "those portions of the [*Lane*] opinion necessary to th[e] result" in that case, *Seminole Tribe*, 517 U.S. at 67, not only disregards a fundamental teaching of this Court, but also conflicts with the Fourth Circuit's decision in *Constantine* v. *Rectors & Visitors of George Mason University*, 411 F.3d 474 (2005). In *Constantine*, which involved Title II's application to public education, the Fourth Circuit held that *Lane*'s analysis precluded adherence to prior circuit precedent holding Title II's abrogation unconstitutional in its entirety. *Id.* at 486

n.8 (*Lane* renders the reasoning that underlay prior circuit precedent "obsolete").

b. The court of appeals' decision also violated established principles of constitutional avoidance, which are at their apex when the Court addresses the constitutionality of an Act of Congress and thereby undertakes "the gravest and most delicate duty" that courts are "called upon to perform." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (internal quotation marks omitted). Because the plaintiffs have challenged Nebraska's administration of a federal spending program (Medicaid), there is no dispute that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, governs the State's conduct and subjects the State and state officials to suit in federal court. App., *infra*, 7a & n.4 (recognizing that Nebraska has made a "knowing waiver of its sovereign immunity [for] actions brought under Section 504"). The substantive standards that Section 504 imposes, moreover, mirror those imposed by Title II. See 42 U.S.C. 12134. Accordingly, the court of appeals' holding that Title II's abrogation of Eleventh Amendment immunity is unconstitutional can have no effect whatsoever on the susceptibility of the State and the same state officials and agency to suit in this case in the same federal court for the same substantive claims and the same relief sought under Title II.

Because the court of appeals' decision can have no effect on the State's liability to suit, the federal forum for the litigation, or the relief that could be imposed, the court's constitutional ruling was not "absolutely necessary to a decision of the case." *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Burton* v. *United States*, 196 U.S. 283, 295 (1905), and *Liverpool, N.Y. & Philadelphia S.S. Co.* v. *Emigration Comm'rs*, 113 U.S. 33, 39 (1885)).

The court of appeals thus improperly "anticipate[d] a question of constitutional law in advance of the necessity of deciding it." *Id.* at 346. Contrary to the court of appeals' supposition, App., *infra*, 7a, that principle of constitutional avoidance applies with full force to Eleventh Amendment immunity claims. See *Lane*, 541 U.S. at 530-531 & n.19; *Board of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 360 n.1 (2001).

2. For the foregoing reasons, the Eighth Circuit erred in holding Title II's abrogation of Eleventh Amendment immunity to be unconstitutional outside the specific context of cases implicating access to the courts, and that decision ordinarily would merit this Court's review—either plenary review, or a decision to grant, vacate, and remand in light of *Lane*. However, on May 16, 2005, this Court granted review in *United States* v. *Georgia*, No. 04-1203, and *Goodman* v. *Georgia*, No. 04-1236, to decide whether Title II is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied to the administration of prison systems. Oral argument in those consolidated cases was held on November 9, 2005.

The Court's decision in *Georgia*, *supra*, and *Goodman*, *supra*, will likely address the proper application of *Lane*'s constitutional analysis to the other contexts in which Title II operates and clarify both the scope of the prior *Lane* holding and the proper methodology for courts to follow in analyzing Title II's constitutionality under *Lane* in future cases. That holding may have particularly close parallels to the case at hand, because this case, like *Georgia* and *Goodman*, involves Title II's application to claims arising in the context of institutionalization. Accordingly, plenary review is not warranted in this case at the present time. Instead, the petition should be held pending the Court's decision in

*Georgia* and *Goodman*, and then disposed of as appropriate in light of that decision.

**CONCLUSION**

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Georgia*, No. 04-1203, and *Goodman* v. *Georgia*, No. 04-1236, and then disposed of in accordance with the Court's decision in those consolidated cases.

Respectfully submitted.

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DECEMBER 2005

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 04-3263

BILL M., BY AND THROUGH HIS FATHER AND NATURAL GUARDIAN, WILLIAM M., AND ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED; JOHN DOE, BY AND THROUGH HIS MOTHER AND NATURAL GUARDIAN, JANE DOE, AND ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED; HEATHER V., BY AND THROUGH HER MOTHER AND GUARDIAN, MARCIA V., AND ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED; JANE S., BY AND THROUGH HER MOTHER AND NATURAL GUARDIAN, PATRICIA S., AND ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED; KEVIN V., BY AND THROUGH HIS MOTHER AND LEGAL GUARDIAN, KATHY V., AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED; JENNIFER T., BY AND THROUGH HER PARENTS AND LEGAL GUARDIANS, SHARON AND GREG T., AND ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED; WILLIAM M., ON BEHALF OF HIS SON, BILL M.; JANE DOE, ON BEHALF OF HER SON, JOHN DOE; MARCIA V., ON BEHALF OF HER DAUGHTER, HEATHER V.; PATRICIA S., ON BEHALF OF HER DAUGHTER, JANE S.; KATHY V., ON BEHALF OF HER SON, KEVIN V.; SHARON T., ON BEHALF OF HER DAUGHTER, JENNIFER T.; GREG T., ON BEHALF OF HIS DAUGHTER, JENNIFER T., PLAINTIFFS/APPELLEES

UNITED STATES OF AMERICA, INTERVENOR ON APPEAL

*v.*

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT; NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES; STEPHEN B. CURTISS, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT; RON ROSS, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANTS/APPELLANTS

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Submitted: Mar. 16, 2005
Filed: May 27, 2005

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**OPINION**

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Before WOLLMAN, HANSEN, and COLLOTON, Circuit Judges.

WOLLMAN, Circuit Judge.

The Nebraska Department of Health and Human Services and the Nebraska Department of Health and Human Services Finance and Support (collectively, Nebraska) appeal from the district court's denial of their motion to dismiss based on Eleventh Amendment sovereign immunity. We reverse.

I.

Bill M. and six other developmentally disabled adults (Plaintiffs) sued Nebraska and various Nebraska officials in their official capacities, alleging violations of Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131 *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; and other federal and state law provisions. Plaintiffs asserted that they are each "eligible for, desire, have applied for

or have attempted to apply for and have been denied home and community-based Medicaid-funded services." Compl. at 2. They alleged that Nebraska's withholding of funding to these services has left them without adequate services to meet their needs and placed them "at imminent risk of unnecessary institutionalization." *Id.* Nebraska and the officials moved to dismiss on various grounds. The district court denied the motion.

This interlocutory appeal is limited to one aspect of the dismissal motion: Nebraska's contention that Eleventh Amendment immunity precludes the district court from having subject matter jurisdiction over the Title II claim. Plaintiffs contend that Title II and related statutory provisions ostensibly abrogate Eleventh Amendment immunity with respect to a Title II claim. Nebraska argues, in response, that the extension of Title II to the states is unconstitutional under our circuit's precedent. The United States has intervened to defend the statutory abrogation.

II.

Although we have jurisdiction over an interlocutory appeal of an order denying Eleventh Amendment immunity under the collateral order doctrine, *Maitland* v. *University of Minnesota*, 260 F.3d 959, 962 (8th Cir.2001), we must also consider the issue of standing.[1] Article III standing requires a party to show actual injury, a causal relation between that injury and the challenged conduct, and the likelihood that a favorable decision by the court will redress the alleged injury.

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[1] Although we raised the question of standing *sua sponte* during oral argument, it is elementary that standing relates to the justiciability of a case and cannot be waived by the parties. *See Sierra Club* v. *Robertson* 28 F.3d 753, 757 n.4 (8th Cir. 1994).

*Minnesota Citizens Concerned for Life* v. *Federal Election Comm'n*, 113 F.3d 129, 131 (8th Cir. 1997) (citing *Lujan* v. *Defenders of the Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Plaintiffs allege in their Title II claim (their first claim for relief) that Nebraska's failure to provide adequate funding "places [Plaintiffs] *at risk of* institutionalization." Compl. at 28 ¶ 117 (emphasis added). The mere risk that Plaintiffs may be institutionalized due to the lack of adequate funding does not constitute an actual or imminent harm sufficient to satisfy the first element of standing.[2]

Plaintiffs also allege, however, in portions of their complaint incorporated by reference into the first claim for relief, *see id.* at 27 ¶ 111, that they have suffered actual harm from Nebraska's refusal to fund home and community-based Medicaid-funded services. *See id.* at 15-16 ¶ 51 (lack of funding precludes necessary residential services in a community setting for Bill M.); *id.* at 17 ¶¶ 55-56 (same for John Doe); *id.* at 19-20 ¶ 69 (Heather V.'s required services are underfunded, which jeopardizes her health and safety); *id.* at 22 ¶ 83 (Jane S. is unable to move to a work setting more suited to her needs due to the denial of additional funding); *id.* at 23 ¶¶ 90-91 (Kevin V.'s services are not adequately funded to protect his health and safety); *id.* at 24 ¶¶ 97-98

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[2] The complaint alleges that the denial of funding to one of the Plaintiffs, Marcus J., has forced him "to remain in a more restrictive institutional setting, *i.e.*, a nursing home, in order to receive the services he needs." Compl. at 26 ¶ 109. Because Plaintiffs' counsel informed us at oral argument that Marcus J. is no longer in a nursing home, we need not address the issue of whether the limitation of services to the "more restrictive institutional setting" of a nursing home would constitute actionable harm sufficient to provide Marcus J. with standing.

(same for Jennifer T.); *id.* at 26 ¶¶ 107-08, 110 (same for Marcus J.). We accept as true all of the complaint's material allegations and construe the complaint in favor of the complaining party for purposes of deciding the question of standing. *See Shain* v. *Veneman*, 376 F.3d 815, 817 (8th Cir. 2004). We conclude that Plaintiffs have alleged concrete and particularized harm sufficient to satisfy the first element of standing. Plaintiffs also meet the other standing requirements that the alleged harm be traceable to the defendant's challenged action and redressable by the court's favorable decision. *See Minnesota Citizens*, 113 F.3d at 131 ("When government action or inaction is challenged by a party who is a target or object of that action . . . 'there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.'") (quoting *Lujan*, 504 U.S. at 561-62, 112 S. Ct. 2130).

III.

We review *de novo* a decision to deny or grant a motion to dismiss for lack of subject matter jurisdiction. *Metzger* v. *Village of Cedar Creek*, Neb., 370 F.3d 822, 823 (8th Cir. 2004). We held in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999) (en banc), that "the extension of Title II of the ADA to the states was not a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment." Accordingly, *Alsbrook* is dispositive here unless it has been superseded.

Plaintiffs and the United States argue that *Alsbrook* has been superseded by *Tennessee* v. *Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004). The plaintiffs in *Lane* were paraplegics who used wheelchairs for mobility. They alleged that the lack of reasonable

access to state and county courthouses constituted a Title II violation. Tennessee moved to dismiss based on Eleventh Amendment immunity, and the plaintiffs argued that Congress had abrogated Eleventh Amendment immunity under Title II. The Supreme Court held that "Title II, *as it applies to the class of cases implicating the fundamental right of access to the courts*, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." *Id.* at 1994 (emphasis added). The Court thus carefully limited its holding to a particularized class of cases. *See id.* at 1993 ("Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, *we need go no further.*") (emphasis added). Several of our sister circuits have interpreted *Lane* accordingly. *See Cochran* v. *Pinchak*, 401 F.3d 184 (3d Cir. 2005) (refusing to extend *Lane* to Title II claims by disabled prison inmates); *Miller* v. *King*, 384 F.3d 1248 (11th Cir. 2004) (same). *See also Pace* v. *Bogalusa City School Bd.*, 403 F.3d 272, 303 (5th Cir. 2005) (en banc) (Jones, J., concurring in part and dissenting in part) (concluding, as to issue not reached by majority, that Fifth Circuit's prior precedent "remains valid in holding that ADA Title II, apart from the *Lane* scenario, does not validly abrogate States' Eleventh Amendment immunity"). We conclude that *Alsbrook* has been modified by *Lane* to the extent that a discrete application of Title II abrogation—related to claims of denial of access to the courts—has been deemed by the Court to constitute a proper exercise of Congress' power. Other applications of Title II abrogation, like the one at issue here, continue to be governed by *Alsbrook*.[3]

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[3] Although *Lane* may well presage the eventual rejection of

IV.

Plaintiffs and the United States argue that even if Nebraska were to prevail on its interlocutory appeal, Nebraska would still have to defend the "essentially identical" claim that Plaintiffs bring under Section 504 of the Rehabilitation Act,[4] as well as the ADA claims brought against the Nebraska officials. Because the Eleventh Amendment provides Nebraska constitutional immunity from suit, the existence of parallel claims is immaterial.[5]

The denial of Nebraska's motion to dismiss based on sovereign immunity with respect to Plaintiffs' Title II claim is reversed, and the case is remanded to the district court with direction to dismiss the Title II claim against Nebraska.

COLLOTON, Circuit Judge, concurring in the judgment.

I agree that Bill M., John Doe, Jane S., and Marcus J. have Article III standing based on their allegations of injury resulting from the State's refusal to provide community-based funding under Medicaid to which they claim entitlement. I also agree that although *Tennessee* v. *Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L.

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*Alsbrook's* rationale, the Supreme Court's carefully cabined holding counsels against a conclusion that *Lane* supersedes *Alsbrook*. Such a determination would have to come from the Supreme Court or from an *en banc* decision of our court.

[4] We held in *Doe* v. *Nebraska*, 345 F.3d 593, 599 (8th Cir. 2003), that Nebraska's receipt of federal funds effected a knowing waiver of its sovereign immunity to actions brought under Section 504.

[5] The United States' argument that we should direct the district court to hold in abeyance the Eleventh Amendment issue until after the Section 504 claim has been resolved fails for the same reason.

Ed. 2d 820 (2004), undermined some of the reasoning of *Alsbrook* v. *City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999) (en banc), our court's en banc precedent still governs this case, which involves only a claim for additional funding of community-based services and implicates no fundamental constitutional right. Accordingly, I concur in the judgment.

**APPENDIX B**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

No. 4:03CV3189

BILL M., BY AND THROUGH HIS FATHER AND NATURAL GUARDIAN, WILLIAM M., ET AL., PLAINTFFS

*vs.*

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT; NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES; STEPHEN B. CURTISS, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT; AND RON ROSS, IN HIS OFFICIAL CAPACITY AS THE DIRECTOR OF NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANTS

**MEMORANDUM AND ORDER**

This is a complex case involving mentally disabled people who receive financial support from Nebraska. Among other things, the plaintiffs allege that the funding (services) they receive from Nebraska is insufficient and thus "discriminatory." It is "discriminatory" because the lack of funds has caused or threatens to cause their institutionalization. *See Olmstead* v. *L.C.*, 527 U.S. 581 (1999) ("discrimination" under the ADA results from "undue" institutionalization and may result from a lack of funding). The plaintiffs seek only injunctive and declaratory relief.

The defendants have moved to dismiss this case asserting, among other things, Eleventh Amendment immunity. Having carefully reviewed the arguments of the defendants, at this stage of the proceeding dismissal would be inappropriate.

Therefore,

IT IS ORDERED that the motion to dismiss (filing 30) is denied.

DATED this 6th day of August, 2004.

BY THE COURT:

/s/ Richard G. Kopf
United States District Judge

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 04-3263

BILL M., ETC., ET AL., APPELLEES

*vs.*

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT, ET AL., APPELLANTS

Aug. 18, 2005

**ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC**

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Judge Murphy, Judge Bye and Judge Melloy would grant the petitions for rehearing en banc.

(5128-010199)

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit

## APPENDIX D

## CONSTITUTION OF THE UNITED STATES

### AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

### AMENDMENT XIV

**SECTION 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

**SECTION 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## SELECTED PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. 12101 *et seq.*

### § 12101. Findings and purpose

#### (a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices,

exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

**(6)** census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

**(7)** individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

**(8)** the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

**(9)** the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

**(b) Purpose**

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

**Title II, Part A, of The Americans With Disabilities Act**

**§ 12131. Definitions**

As used in this subchapter:

**(1) Public entity**

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 2410(4) of title 49).

**(2) Qualified individual with a disability**

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

**§ 12132. Discrimination**

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

### § 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

### § 12134. Regulations

#### (a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

#### (b) Relationship to other regulations

Except for "program accessibility, existing facilities," and "communications," regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of title 29.

**(c) Standards**

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

* * * * *

**Title IV of The Americans With Disabilities Act**

**§ 12201. Construction**

**(a) In general**

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

**(b) Relationship to other laws**

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II or III of this chapter, or in places of public accommodation covered by subchapter III of this chapter.

**(c) Insurance**

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organi-

zations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter[2] I and III of this chapter.

**(d) Accommodations and services**

Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

**§ 12202. State immunity**

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in[3] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the

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[2] So in original. Probably should be "subchapters".

[3] So in original. Probably should be "in a".

same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

**§ 12203. Prohibition against retaliation and coercion**

**(a) Retaliation**

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

**(b) Interference, coercion, or intimidation**

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

**(c) Remedies and procedures**

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

### § 12204. Regulations by Architectural and Transportation Barriers Compliance Board

#### (a) Issuance of guidelines

Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter.

#### (b) Contents of guidelines

The supplemental guidelines issued under subsection (a) of this section shall establish additional requirements, consistent with this chapter, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

#### (c) Qualified historic properties

##### (1) In general

The supplemental guidelines issued under subsection (a) of this section shall include procedures and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in 4.1.7(1)(a) of the Uniform Federal Accessibility Standards.

##### (2) Sites eligible for listing in National Register

With respect to alterations of buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preserva-

tion Act (16 U.S.C. 470 et seq.), the guidelines described in paragraph (1) shall, at a minimum, maintain the procedures and requirements established in 4.1.7(1) and (2) of the Uniform Federal Accessibility Standards.

**(3) Other sites**

With respect to alterations of buildings or facilities designated as historic under State or local law, the guidelines described in paragraph (1) shall establish procedures equivalent to those established by 4.1.7(1)(b) and (c) of the Uniform Federal Accessibility Standards, and shall require, at a minimum, compliance with the requirements established in 4.1.7(2) of such standards.

**§ 12205. Attorney's fees**

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

**§ 12206. Technical assistance**

**(c) Plan for assistance**

**(1) In general**

Not later than 180 days after July 26, 1990, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chairman of the Federal Com-

munications Commission, shall develop a plan to assist entities covered under this chapter, and other Federal agencies, in understanding the responsibility of such entities and agencies under this chapter.

**(2) Publication of plan**

The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with subchapter II of chapter 5 of title 5 (commonly known as the Administrative Procedure Act).

**(b) Agency and public assistance**

The Attorney General may obtain the assistance of other Federal agencies in carrying out subsection (a) of this section, including the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

**(c) Implementation**

**(1) Rendering assistance**

Each Federal agency that has responsibility under paragraph (2) for implementing this chapter may render technical assistance to individuals and institutions that have rights or duties under the respective subchapter or subchapters of this chapter for which such agency has responsibility.

**(2) Implementation of subchapters**

**(A) Subchapter I**

The Equal Employment Opportunity Commission and the Attorney General shall implement the plan for assistance developed under subsection (a) of this section, for subchapter I of this chapter.

**(B) Subchapter II**

**(i) Part A**

The Attorney General shall implement such plan for assistance for part A of subchapter II of this chapter.

**(ii) Part B**

The Secretary of Transportation shall implement such plan for assistance for part B subchapter II of this chapter.

**(C) Subchapter III**

The Attorney General, in coordination with Secretary of Transportation and the Chair of the Architectural Transportation Barriers Compliance Board, shall implement such plan for assistance for subchapter III of this chapter, except for section 12184 of this title, the plan for assistance for which shall be implemented by the Secretary of Transportation.

**(D) Title IV**

The Chairman of the Federal Communications Commission, in coordination with the Attorney General, shall implement such plan for assistance for title IV.

**(3) Technical assistance manuals**

Each Federal agency that has responsibility under paragraph (2) for implementing this chapter shall, as part of its implementation responsibilities, ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or duties under this chapter no later than six months after applicable final regulations are published under subchapters I, II, and III of this chapter and title IV.

**(d) Grants and contracts**

**(1) In general**

Each Federal agency that has responsibility under subsection (c)(2) of this section for implementing this chapter may make grants or award contracts to effectuate the purposes of this section, subject to the availability of appropriations. Such grants and contracts may be awarded to individuals, institutions not organized for profit and no part of the net earnings of which inures to the benefit or any private shareholder or individual (including educational institutions), and associations representing individuals who have rights or duties under this chapter. Contracts may be awarded to entities

organized for profit, but such entities may not be the recipients or[1] grants described in this paragraph.

**(2) Dissemination of information**

Such grants and contracts, among other uses, may be designed to ensure wide dissemination of information about the rights and duties established by this chapter and to provide information and technical assistance about techniques for effective compliance with this chapter.

**(e) Failure to receive assistance**

An employer, public accommodation, or other entity covered under this chapter shall not be excused from compliance with the requirements of this chapter because of any failure to receive technical assistance under this section, including any failure in the development or dissemination of any technical assistance manual authorized by this section.

**§ 12207. Federal wilderness areas**

**(a) Study**

The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act (16 U.S.C. 1131 *et seq.*).

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[1] So in original. Probably should be "of".

**(b) Submission of report**

Not later than 1 year after July 26, 1990, the National Council on Disability shall submit the report required under subsection (a) of this section to Congress.

**(c) Specific wilderness access**

**(1) In general**

Congress reaffirms that nothing in the Wilderness Act [16 U.S.C. 1131 et seq.] is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area in order to facilitate such use.

**(2) "Wheelchair" defined**

For purposes of paragraph (1), the term "wheelchair" means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area.

**§ 12208. Transvestites**

For the purposes of this chapter, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

**§ 12209. Instrumentalities of the Congress**

The General Accounting Office, the Government Printing Office, and the Library of Congress shall be covered as follows:

**(1) In general**

The rights and protections under this chapter shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

**(2) Establishment of remedies and procedures by instrumentalities**

The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1).

**(3) Report to Congress**

The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

**(4) Definition of instrumentality**

For purposes of this section, the term "instrumentality of the Congress" means the following:,[1] the General Accounting Office, the Government Printing Office, and the Library of Congress,.[1]

**(5) Enforcement of employment rights**

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any employee of an instrumentality of the Congress who alleges a violation of the rights and protections under sections 12112 through 12114 of this title that are made applicable by this section, except that the authorities of

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[1] So in original. The comma probably should not appear.

the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

**(6) Enforcement of rights to public services and accommodations**

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any qualified person with a disability who is a visitor, guest, or patron of an instrumentality of Congress and who alleges a violation of the rights and protections under sections 12131 through 12150 or section 12182 or 12183 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

**(7) Construction**

Nothing in this section shall alter the enforcement procedures for individuals with disabilities provided in the General Accounting Office Personnel Act of 1980 and regulations promulgated pursuant to that Act.

**§ 12210. Illegal use of drugs**

**(a) In general**

For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

**(b) Rules of construction**

Nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who—

**(1)** has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

**(2)** is participating in a supervised rehabilitation program and is no longer engaging in such use; or

**(3)** is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

**(c) Health and other services**

Notwithstanding subsection (a) of this section and section 12211(b)(3) of this title, an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

**(d) "Illegal use of drugs" defined**

**(1) In general**

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or other provisions of Federal law.

**(2) Drugs**

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

**§ 12211. Definitions**

**(a) Homosexuality and bisexuality**

For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

**(b) Certain conditions**

Under this chapter, the term "disability" shall not include—

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

**§ 12212. Alternative means of dispute resolution**

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

**§ 12213. Severability**

Should any provision in this chapter be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of this chapter and such action shall not affect the enforceability of the remaining provisions of this chapter.

No. 05-777



In The
# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

v.

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT, ET AL.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF FOR THE PRIVATE RESPONDENTS IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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## BRIEF FOR THE PRIVATE RESPONDENTS IN SUPPORT OF THE PETITION

Respondents Bill M., *et al.*, the private plaintiffs in the action under review, respectfully submit this brief in support of the petition for certiorari filed by the United States of America.

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## STATEMENT

Respondent Bill M. and six other adults with developmental disabilities, by and through their guardians, brought this action in the United States District Court for the District of Nebraska on May 19, 2003. They alleged that they were eligible for, but had been denied, home- and community-based Medicaid services, and that as a result they were "'at imminent risk of unnecessary institutionalization.'" Pet. App. 3a (quoting Cplt. 2). The state's failure to provide home- and community-based services, they contended, violated both Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §12131 *et seq.*, and Section 504 of the Rehabilitation Act, 29 U.S.C. §794, as well as other provisions of state and federal law. Pet. App. 2a; *see Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999) (concluding that "unjustified institutional isolation of persons with disabilities is a form of discrimination" that in appropriate circumstances violates Title II of the ADA). They sought declaratory and injunctive relief, but not damages, against the Nebraska Department of Health and Human Services Finance and Support and (in their official capacities) against the state officials responsible for running Nebraska's Medicaid program.

Invoking its sovereign immunity, the state moved to dismiss the ADA claim. The district court denied that motion as to the State agency defendants. Pet. App. 10a. The state took an interlocutory appeal (in which the United States intervened to defend the constitutionality of the ADA), and the Court of Appeals for the Eighth Circuit reversed. *Id.* at 1a-8a. The court of appeals relied on its 1999 *en banc* decision in *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999), which held that "the extension of Title II of the ADA to the states was not a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment" and that the statute thus could not validly abrogate state sovereign immunity. Although this Court, after *Alsbrook*, upheld Title II as valid Section 5 legislation in *Tennessee v. Lane*, 541 U.S. 509 (2004), the court of appeals effectively confined *Lane* to its facts: "We conclude that *Alsbrook* has been modified by *Lane* to the extent that a discrete application of Title II abrogation – related to claims of denial of access to the courts – has been deemed by the Court to constitute a proper exercise of Congress' power. Other applications of Title II abrogation, like the one at issue here, continue to be governed by *Alsbrook*." Pet. App. 6a. Because this case does not involve a claim of access to the courts, the court of appeals believed *Lane* to be immaterial – even though the panel majority acknowledged that "*Lane* may well presage the eventual rejection of *Alsbrook*'s rationale," *id.* at 6a-7a n. 3, and a concurring judge agreed that *Lane* "undermined some of the reasoning of *Alsbrook*," *id.* at 8a (Colloton, J., concurring in the judgment). The court thus concluded

that the ADA claim against the State of Nebraska must be dismissed. *Id.* at 7a.[1]

The private plaintiffs and the United States filed petitions for rehearing *en banc*. They contended that *Alsbrook* was no longer good law after *Lane*, and that the panel's decision conflicted with recent decisions from the Fourth and Eleventh Circuits, *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005); and *Association for Disabled Americans, Inc. v. Florida Int'l Univ.*, 405 F.3d 954 (11th Cir. 2005). But the court, with three judges dissenting, denied the petition for rehearing *en banc*. Pet. App. 11a.

## REASONS FOR GRANTING THE WRIT

Respondents Bill M., *et al.*, agree with the United States that the petition in this case should be held pending this Court's decision in the consolidated cases of *United States v. Georgia*, No. 04-1203, and *Goodman v. Georgia*, No. 04-1236. As the United States argues, that decision "will likely address the proper application of *Lane*'s constitutional analysis to the other contexts in which Title II operates and clarify both the scope of the prior *Lane* holding and the proper methodology for courts to follow in analyzing Title II's constitutionality under *Lane* in future cases." Pet. 10.

[1] The plaintiffs had contended that the court of appeals should not reach the question of the ADA's constitutionality under Section 5, because the ADA claim against the state added nothing to the relief they could obtain under their Rehabilitation Act claims and their ADA claims against the Nebraska officials in their official capacities. But the court of appeals refused to avoid the constitutional question. Pet. App. 7a.

This Court should thus dispose of this case as appropriate in light of its decision in *Georgia* and *Goodman*. As we show below, moreover, the Eighth Circuit's decision in this case is incorrect and creates a conflict in the circuits.

### A. The Eighth Circuit's Decision Is Incorrect

The court of appeals manifestly misread this Court's decision in *Lane*. In holding that Title II, as applied here, is not valid Section 5 legislation, the court of appeals relied entirely on its 1999 decision in *Alsbrook*, *supra*. Addressing the constitutionality of the statute across the board, *Alsbrook* held "that the extension of Title II of the ADA to the states was not a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment." *Alsbrook*, 184 F.3d at 1010. But in its intervening decision in *Lane*, *supra*, this Court fatally undermined *Alsbrook*. In sharp contrast to *Alsbrook*'s holding that Title II was not valid Section 5 legislation in *any* application, *Lane* held that the statute *was* valid Section 5 legislation as applied to the case before it. *See Lane*, 541 U.S. at 531. And *Lane* rejected key aspects of *Alsbrook*'s reasoning as well.

First, *Lane* rejected the across-the-board analysis the Eighth Circuit employed in *Alsbrook*. In *Alsbrook*, the court did not focus its Section 5 analysis on the particular context in which the plaintiff sought to apply Title II – the state's certification of law enforcement officers. Instead, it examined the Section 5 basis for Title II as a whole. *See Alsbrook*, 184 F.3d at 1010 (holding, without qualification, that "the extension of Title II of the ADA to the states was not a proper exercise of Congress's power under Section 5); *id.* at 1006 n. 11 (stating that the "proper scope of our Section 5 inquiry" is "Title II of the ADA," without limitation). In

determining whether Title II satisfied the "congruence and proportionality" standard set forth in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997), the *Alsbrook* court believed the statute to be disproportionate because of the breadth of its possible applications: "Title II targets *every* state law, policy, or program." *Alsbrook*, 184 F.3d at 1009 (emphasis in original).

*Lane*, by contrast, specifically refused "to consider Title II, with its wide variety of applications, as an undifferentiated whole." *Lane*, 541 U.S. at 530. "Whatever might be said about Title II's other applications," this Court concluded, the Section 5 inquiry must focus on whether Congress had a sufficient basis to apply the statute to the "class of cases" like the one before the Court. *Id.* at 530-531. This Court found support for such a context-specific analysis in both well-settled principles of judicial restraint, *see id.* at 531 n. 19, and "the nature of the *Boerne* inquiry" itself, *id.* at 530 n. 18. Because *Alsbrook* refused to engage in such a context-specific analysis, and instead relied on Title II's "wide variety of applications," *id.* at 530, as a basis for concluding that the statute was invalid Section 5 legislation across the board, its holding cannot stand after *Lane*.

Second, *Lane* makes clear that the *Alsbrook* court erred in looking only to the Equal Protection Clause as a possible constitutional basis for Title II. In determining whether the statute was congruent and proportional to violations of the Constitution, *Alsbrook* considered only whether "Congress has acted to enforce equal protection guarantees for the disabled." *Alsbrook*, 184 F.3d at 1010. Finding "an absence of a showing of widespread discrimination on the part of the states," the Eighth Circuit did "not think that Title II 'enforces' the rational relationship standard recognized by

the Supreme Court in *Cleburne*." *Id.* at 1008, 1010 n. 17; *see City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (rational-basis test governs equal protection challenges to discrimination against people with mental retardation). Based solely on that asserted lack of connection to possible equal protection violations, *Alsbrook* held that the statute was not valid Section 5 legislation. *See Alsbrook*, 184 F.3d at 1010 ("In sum, it cannot be said that in applying Title II of the ADA to the states, Congress has acted to enforce equal protection guarantees for the disabled as they have been defined by the Supreme Court. We, find, therefore, that the extension of Title II of the ADA to the states was not a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment.").

*Lane* recognized that, at least in part, Title II "seeks to enforce th[e] prohibition on irrational disability discrimination." *Lane*, 541 U.S. at 522. But, contrary to *Alsbrook*, it held that the statute "also seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Id.* at 522-523. With *all* of the relevant constitutional guarantees in full view, this Court concluded that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights." *Id.* at 524. This Court noted that its own cases had "identified unconstitutional treatment of disabled persons by state agencies in a variety of settings" – including, of particular importance here, "unjustified commitment" and "the abuse and neglect of persons committed to state mental health hospitals." *Id.* at 524-525 (citing *Jackson v. Indiana*, 406 U.S. 715 (1972) (unjustified commitment denies due process and equal protection);

*Youngberg v. Romeo*, 457 U.S. 307 (1982) (abuse and neglect denies due process)); *see also id.* at 525 n. 10 (noting "[t]he undisputed findings of fact" in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 7 (1981), that "'[c]onditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the "habilitation" of the retarded'"). The Eighth Circuit's 1999 conclusion that the record of state constitutional violations was insufficient to justify Title II cannot stand after *Lane*.

Finally, *Lane* makes clear that *Alsbrook* entertained too narrow a view of the scope of Congress's Section 5 power. *Alsbrook* held that, "regardless of the extent of its findings, Congress, under Section 5, only has the power to prohibit that which the Fourteenth Amendment prohibits." *Alsbrook*, 184 F.3d at 1008. But *Lane* reaffirmed that "Congress is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment, and may prohibit a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Lane*, 541 U.S. at 533 n. 24 (internal quotation marks omitted). Applying that principle, this Court upheld the application of Title II to cases involving access to courts – even where the defendant's conduct did not itself violate the Constitution – as "a reasonable prophylactic measure, reasonably targeted to a legitimate end." *Id.* at 533. In so holding, the Court followed its decision a year earlier in *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 737-738 (2003). *Hibbs* upheld, as proper prophylactic Section 5 legislation, the Family and Medical Leave Act's requirement that all covered employees receive family-care leave; the Court did

so even though the statute extends to conduct that the Fourteenth Amendment does not itself prohibit. *See id.*

*Lane* thus rejected both the precise holding and all of the crucial reasoning in *Alsbrook*. By continuing to adhere to *Alsbrook*, the court of appeals disregarded this Court's decision in *Lane*.

### B. The Eighth Circuit's Decision Conflicts With Decisions Of The Fourth And Eleventh Circuits

In direct conflict with the Eighth Circuit's decision in this case, both the Fourth and Eleventh Circuits have recognized that *Lane*'s reasoning extends beyond the access-to-courts context of that case. They have concluded that *Lane* requires the Section 5 basis for Title II to be freshly "considered context by context." *Miller v. King*, 384 F.3d 1248, 1276 n. 34 (11th Cir. 2004); *see also Association for Disabled Americans*, 405 F.3d at 958 (reading *Lane* as "emphasiz[ing] that the congruence and proportionality of the remedies in Title II should be judged on an individual or 'as-applied' basis in light of the particular constitutional rights at stake in the relevant category of public services"). In engaging in that context-specific analysis, they have held that Title II is valid Section 5 legislation even outside *Lane*'s access-to-courts context – holdings that cannot be squared with the Eighth Circuit's decision here.

In *Constantine*, 411 F.3d at 490, the Fourth Circuit applied *Lane* to hold that "Title II of the ADA is valid §5 legislation, at least as it applies to public higher education." Like the Eighth Circuit in *Alsbrook*, the Fourth Circuit had ruled prior to *Lane* that Title II was invalid Section 5 legislation across the board. *See Wessel v. Glendening*, 306 F.3d 203, 207-208 (4th Cir. 2002). But, in

direct conflict with the Eighth Circuit, the Fourth Circuit in *Constantine* concluded that "[w]hile *Lane* specifically overrules *Wessel* only with respect to the application of Title II to cases involving the right of access to courts, the reasoning of *Lane* renders *Wessel* obsolete." *Constantine*, 411 F.3d at 486 n. 8. Similarly, in *Association for Disabled Americans*, 405 F.3d at 958, the Eleventh Circuit held that Title II, "as applied to access to public education, constitutes a valid exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment." In so ruling, the Eleventh Circuit noted that *Lane* had "conclusively held that Congress had documented a sufficient historical predicate of unconstitutional disability discrimination in the provision of public services to justify enactment of a prophylactic remedy," and it emphasized that the Supreme Court pointed to "'a pattern of unequal treatment'" that went well beyond the access-to-courts context. *Id.* (quoting *Lane*, 541 U.S. at 525).

The rulings of the Fourth and Eleventh Circuits treat pre-*Lane* across-the-board rulings like *Alsbrook* as "obsolete," *Constantine*, 411 F.3d at 486 n. 8, and demand an "as-applied" approach that looks to "the particular constitutional rights at stake in the relevant category of public services," *Association for Disabled Americans*, 405 F.3d at 958. Those cases directly conflict with the Eighth Circuit's holding here that *Alsbrook*'s across-the-board invalidation of Title II continues to apply to all applications of the statute outside of the "discrete" access-to-courts context. Pet. App. 6a. That conflict would ordinarily warrant this Court's plenary review – especially because the court of appeals held a federal statute unconstitutional. However, because this Court's decision in *Georgia* and *Goodman* will

likely clarify the scope of *Lane*'s holding and the methodology of Section 5 analysis in the context of Title II of the ADA, this petition should be held pending this Court's decision in those cases.

## CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States v. Georgia*, No. 04-1203, and *Goodman v. Georgia*, No. 04-1236, and then disposed of in accordance with the Court's decision in those consolidated cases.

Respectfully submitted,

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January 2006

(3)

No. 05-777



In The
# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

v.

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT, ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF FOR RESPONDENTS NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT, ET AL. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress' power under Section V of the Fourteenth Amendment, as applied to potential institutionalization.

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## ARGUMENT

### A. The Eighth Circuit's Decision Is Not In Conflict With Relevant Decisions Of This Court

This Court's Rule 10 establishes criteria to be considered by this Court in weighing a Petition for a Writ of Certiorari. The only potentially applicable provision of Rule 10 is section (c).

#### No conflict with this Court's prior rulings

The Eighth Circuit's opinion is consistent with this Court's holdings in *Tennessee v. Lane*, 541 U.S. 509 (2004) and the companion cases of *United States v. Georgia* and *Goodman v. Georgia*, 126 S. Ct. 877 (2004). In *Lane*, this Court held that Title II, when applied to cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' enforcement power under the Fourteenth Amendment. Recently, this Court declared in *Georgia* and *Goodman* that Title II validly abrogates state sovereign immunity "insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment." Consequently, the Eighth Circuit opinion was in line with this Court's precedent in holding that Title II, as applied to plaintiffs claiming additional funding of community-based services, is not a valid exercise of Congress' § 5 enforcement power under the Fourteenth Amendment.

#### No fundamental right violated

The Petitioner's claim for additional funding of community-based services does not implicate a fundamental constitutional right under the Fourteenth Amendment. In

*Lane*, the plaintiffs were paraplegics who used wheelchairs and claimed that they were denied both the access to, and the services of, the state court system because of their disabilities. One of the plaintiffs, George Lane, alleged that he was compelled to make an appearance and answer criminal charges on the second floor of a county courthouse that had no elevator, crawled up two flights of stairs on his first appearance to get to the courtroom, and was arrested and jailed for failure to appear after refusing to crawl or be carried by officers to the courtroom on subsequent occasions.

The other plaintiff, Beverly Jones, a certified court reporter, alleged that she was not able to gain access to numerous court houses, and consequently lost work and opportunities to participate in the judicial process. Recognizing that Title II seeks not only to enforce a "prohibition on irrational disability discrimination," but also "other basic constitutional guarantees," this Court held that "Title II, as it applies to the class of cases *implicating the fundamental right of access to the courts*, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment." *Lane*, 541 U.S. at 522, 534 (emphasis added).

Nor is this a classic deinstitutionalization case with plaintiffs residing in institutions as in *Olmstead v. L.C.*, 527 U.S. 581 (1999). In the present matter, Petitioners are seven developmentally disabled adults, alleging receipt of an inadequate level of home and community-based Medicaid-funded services that placed them at "imminent risk of unnecessary institutionalization." *Bill M. v. Nebraska Department of Health and Human Services Finance and Support*, 408 F.3d 1096, 1098 (8th Cir. 2006). Indeed, this Court has acknowledged that unjustified commitment

violates due process and equal protection rights secured under the Fourteenth Amendment. *See Jackson v. Indiana*, 406 U.S. 715 (1972). However, in this case, Petitioners merely allege an "imminent risk of unnecessary institutionalization." None of the Petitioners presently reside in an institution. As compared to the plaintiffs in *Lane*, the Petitioners are not seeking enforcement of a fundamental right of which they have been deprived, such as access to the court system. Here, Petitioners are seeking additional funding of community-based services, which "implicates no fundamental constitutional right." *Bill M.*, 408 F.3d at 1101 (Colloton, J., *concurring*).

Furthermore, the Respondents' conduct in this case has not violated the Fourteenth Amendment. In *Lane*'s companion cases of *Georgia* and *Goodman*, the plaintiff alleged that he was confined to a 12-foot-by-3-foot cell for approximately 24 hours per day, which prevented him from turning his wheel chair around in the cell. Additionally, the plaintiff alleged that he injured himself in attempting to move from his wheelchair to the shower or toilet by himself, that he was forced to sit in his own feces and urine on several occasions without assistance from prison officials, and that he was denied medical treatment, physical therapy, and access to essentially all prison programs and services due to his disability. This Court granted certiorari to determine whether Title II validly abrogated state sovereign immunity with respect to the plaintiff's claims. In its reasoning, this Court acknowledged that "§ 5 grants Congress the power to enforce the provisions of the [Fourteenth] Amendment by creating private remedies against the States for actual violations of those provisions." *Georgia*, 126 S. Ct. at 881. Accordingly, this Court held that "insofar as Title II creates a private

cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." *Id.* at 882. Consequently, this Court remanded the suit to enable the lower courts to determine, *inter alia*, "to what extent such misconduct also violated the Fourteenth Amendment." *Id.*

However, the Respondents' alleged conduct did not violate the provisions of the Fourteenth Amendment. Unlike the plaintiff in *Georgia* who alleged numerous potential violations of the Fourteenth Amendment, Petitioners merely allege that they have been placed at "imminent risk of unnecessary institutionalization." *Bill M.*, 408 F.3d at 1098. The Eighth Circuit opinion acknowledged this point in holding that "[t]he mere risk that Plaintiffs may be institutionalized due to lack of adequate funding does not constitute an actual or imminent harm sufficient to satisfy the first element of standing." *Id.* at 1099. Therefore, in holding that Title II did not validly abrogate state sovereign immunity, the Eighth Circuit opinion was consistent with this Court's ruling in *Georgia*.

Even if the Eighth Circuit opinion engaged in a "context specific analysis" and considered due process as a constitutional basis for Title II, the circuit court's ultimate holding would not have been altered. As mentioned above, Title II, as applied to plaintiffs claiming additional funding of community-based services does not implicate a fundamental right. Petitioners failed to allege an actual or imminent deprivation of a fundamental right under the Due Process Clause. Therefore, the Eighth Circuit's opinion is not in conflict with the relevant decisions of this Court.

## CONCLUSION

The Respondents hereby respectfully request that this Court deny the Petitioner's Petition For A Writ Of Certiorari for the foregoing reasons which clearly demonstrate that said Petition does not pass Rule 10 muster.

Respectfully submitted,

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(4)

No. 05-777

# In The Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

v.

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT, ET AL.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## SUPPLEMENTAL BRIEF FOR THE PRIVATE RESPONDENTS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI


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## SUPPLEMENTAL BRIEF FOR THE PRIVATE RESPONDENTS IN SUPPORT OF THE PETITION

In our brief for the Private Respondents in Support of the Petition, we argued that the Eighth Circuit's decision was in direct conflict with *Tennessee v. Lane*, 541 U.S. 509 (2004). We urged that the Court hold the petition in this case pending resolution of *United States v. Georgia*, 126 S. Ct. 877 (2006), and then dispose of it as appropriate in light of the *Georgia* decision. On January 10, 2006, this Court issued a unanimous opinion reversing the Eleventh Circuit in the *Georgia* case. That decision underscores the error in the Eighth Circuit's ruling here. Accordingly, in light of *Georgia*, this Court should grant the writ of certiorari, vacate the judgment of the court of appeals, and remand for further proceedings in which that court will consider whether Title II of the Americans with Disabilities Act (Title II) is valid Section 5 legislation as applied to the plaintiffs' claims.

## ARGUMENT

Five years before this Court decided *Lane*, the Eighth Circuit ruled, in *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), cert. dismissed, 529 U.S. 1001 (2000), that Title II was not valid Section 5 legislation in any of its applications. The *Alsbrook* court explicitly said that "the scope of [its] Section 5 inquiry" looked to "Title II of the ADA" as a whole. *Id.* at 1006 n.11. And that broad focus was central to the *Alsbrook* decision. Ruling the statute invalid under Section 5, the court relied heavily on the wide array of possible applications of the statute to state government: "Title II targets *every* state law, policy, or program." *Id.* at 1009 (emphasis in original).

As we showed in our earlier brief, *Lane* fatally undermined both the bottom-line holding and the key analysis in *Alsbrook*. Contrary to *Alsbrook*'s holding that Title II was invalid Section 5 legislation in all of its applications, *Lane* held that Title II was valid Section 5 legislation in the case before it. *See Lane*, 541 U.S. at 531. And contrary to *Alsbrook*'s conclusion that the Section 5 analysis should focus on Title II as a whole, *Lane* refused "to consider Title II, with its wide variety of applications, as an undifferentiated whole." *Id.* at 530. Instead, the Court made clear that the proper question is whether Congress had Section 5 authority to apply Title II to the "class of cases" like the one before the Court. *Id.* at 530-531.

In its decision here, the Eighth Circuit gave *Lane* an unduly grudging construction. Although *Lane* directly conflicts with both the holding and the reasoning of *Alsbrook*, the court held that *Alsbrook*'s across-the-board invalidation of Title II continues to control in all cases outside of the "discrete" context of "claims of denial of access to the courts." Pet. App. 6a. Accordingly, the court simply refused to consider whether, as applied to this case and the class of cases like it, Title II might be valid Section 5 legislation. *See id.* at 5a-6a.

After this Court's decision in *Georgia*, the Eighth Circuit's judgment can no longer stand. *Georgia* makes clear that *Lane*'s as-applied focus on the "class of cases" like those before the court is not a special procedure limited to access-to-courts cases. After all, *Georgia* upheld Title II as valid Section 5 legislation in a class of cases *outside* the access-to-courts context (Title II prison cases alleging "conduct that *actually* violates the Fourteenth Amendment," *Georgia*, 126 S. Ct. at 882 (emphasis in original)). More important, *Georgia* specifically instructed

the lower courts to evaluate the constitutionality of Title II "on a claim-by-claim basis," *id.* at 882 – *i.e.*, according to the as-applied approach of *Lane*, rather than the facial approach of *Alsbrook*.

Moreover, the Eighth Circuit's decision here relied heavily on two pre-*Georgia* court of appeals decisions that held Title II to be invalid Section 5 legislation in the prison context. *See* Pet. App. 6a (citing *Cochran v. Pinchak*, 401 F.3d 184 (3d Cir. 2005); *Miller v. King*, 384 F.3d 1248 (11th Cir. 2005)). One of those decisions, *Miller*, *supra*, was the basis for the Eleventh Circuit judgment this Court reviewed in *Georgia*. *See Georgia*, 126 S. Ct. at 880. This Court's reversal in *Georgia* established, at the least, that *Miller* was wrong and that the ADA is valid Section 5 legislation in at least some prison cases. *Georgia* thus undermined some of the key authority on which the Eighth Circuit relied here.

In its Brief in Opposition (at 1-4), the state argues that Title II is not valid Section 5 legislation as applied to this case, because the plaintiffs' claims implicate no fundamental rights or actual constitutional violations. That is incorrect. This case, and the "class of cases" like it, implicates the fundamental right to avoid unjustified commitment and to be free from harmful conditions of commitment. *See Jackson v. Indiana*, 406 U.S. 715 (1972); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *see also Lane*, 541 U.S. at 524-525 (recognizing that Title II enforces these fundamental rights).

But the state's as-applied argument fails at a more basic level. The Eighth Circuit pretermitted any inquiry into whether Title II is valid Section 5 legislation as applied to this case, because it ruled that an as-applied

inquiry is appropriate only in access-to-courts cases. That was a misreading of *Lane*, as *Georgia* makes entirely clear. This Court should vacate the Eighth Circuit's judgment and remand so that the court of appeals can conduct the as-applied inquiry that *Lane* and *Georgia* mandate: Is Title II, as applied to this case or the "class of cases" like it, valid Section 5 legislation?

## CONCLUSION

This Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand for that court to conduct the as-applied inquiry required by this Court's decisions in *Lane* and *Georgia*.

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March 2006

(5)

No. 05-777

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

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No. 05-777

UNITED STATES OF AMERICA, PETITIONER

*v.*

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES FINANCE AND SUPPORT, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

1. The court of appeals held that Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is not a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied in the context of institutionalization. Pet. App. 5a-6a. As explained in the government's petition for a writ of certiorari, Pet. 6-10, that ruling reflected a fundamental disregard of this Court's prior decision in *Tennessee* v. *Lane*, 541 U.S. 509 (2004), with respect to both the constitutional decisions rendered in that case and the principle of constitutional avoidance that it applied. Pet. 6-10. Given the gravity of the court of appeals' holding that an Act of Congress is unconstitutional and the court's failure to adhere to precedent and long-established principles of constitutional avoidance, the peti-

tion explained that the case warrants this Court's review—whether plenary or, at a minimum, a decision to grant, vacate, and remand in light of *Lane*. Pet. 10. However, in light of the pendency at that time of *United States* v. *Georgia*, No. 04-1203, and *Goodman* v. *Georgia*, No. 04-1236, which presented the question of Congress's power to apply Title II to the administration of prison systems, the United States suggested that the present petition be held pending this Court's decision in those cases. Pet. 10-11.

On January 10, 2006, this Court issued its decision in *United States* v. *Georgia* and *Goodman* v. *Georgia*. See *United States* v. *Georgia*, 126 S. Ct. 877. In *Georgia*, the Court unanimously reaffirmed its context-specific approach to the analysis of Title II's constitutionality, upholding the law as a proper exercise of Congress's Section 5 power to the extent that it "creat[es] private remedies against the States for *actual* violations" of the rights protected by Section 1 of the Fourteenth Amendment. *Id.* at 881; see *id.* at 882 ("[I]nsofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity."). The Court further held that, to the extent that Title II is used directly to enforce rights protected by Section 1 of the Fourteenth Amendment, "the lower courts will be best situated to determine in the first instance, on a claim-by-claim basis," which rights are at issue in a given case. *Id.* at 882.

2. The Court's recent decision in *Georgia* magnifies the constitutional errors in the court of appeals' decision that were identified in the government's petition for a writ of certiorari and, in particular, the court of appeals' disregard for the constitutional framework established

by *Lane*—and reconfirmed by *Georgia*—and the predicate holdings that underlie *Lane*'s judgment.

The court of appeals held that its prior decision in *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), cert. dismissed, 529 U.S. 1001 (2000), compelled the conclusion that Title II is unconstitutional in all of its applications save the class of cases implicating access to the courts addressed in *Lane*, and that no more particularized inquiry needed to be undertaken into the constitutionality of Title II. Pet. App. 6a. But *Alsbrook* was decided on the basis that Title II only enforces the Fourteenth Amendment's Equal Protection Clause. 184 F.3d at 1008-1009. Both *Georgia* and *Lane* held that, in analyzing Congress's exercise of its Section 5 power, courts must take account of the fact that Title II enforces multiple constitutional rights. See *Georgia*, 126 S. Ct. at 880-881 (Title II enforces the Eighth Amendment); *Lane*, 541 U.S. at 522-523 (listing the numerous constitutional rights enforced by Title II).

In addition, the court of appeals here held that—after *Lane*—its sweeping invalidation of Title II in *Alsbrook* "ha[d] been modified" only with respect to Title II's "discrete application * * * to claims of denial of access to the courts." Pet. App. 6a. *Georgia* makes clear, however, that *Alsbrook* was also wrong, at a minimum, with respect to some claims arising in the context of institutionalization—those claims that seek to remedy actual constitutional violations. 126 S. Ct. at 881-882. While respondent insists that this case does not implicate any fundamental constitutional rights, the private respondents supporting the petition expressly disagree. Private Resp. Supp. Br. 3. As this Court recognized in *Georgia*, 126 S. Ct. at 882, resolution of that question is best addressed by the lower court in the first instance,

within the framework of this Court's decisions in *Georgia* and *Lane*.

Furthermore, the Court in *Georgia* unanimously directed that, with respect to Title II's prophylactic enforcement of constitutional rights, courts must address Title II's constitutionality based on the particular "class of conduct" at issue, whether the question arises in the institutionalization context or elsewhere. 126 S. Ct. at 882. The court of appeals' wholesale invalidation of all of Title II except for access-to-the-courts cases cannot be reconciled with *Georgia*'s directive, or with *Lane*.

The Eighth Circuit's departure from precedent does not stop there. In the *Alsbrook* decision on which the court relied here, the Eighth Circuit held that Congress lacked a sufficient record of discrimination to enact Title II. 184 F.3d at 1009. In *Lane*, however, this Court expressly held that Congress passed Title II in response to an "extensive record of disability discrimination," 541 U.S. at 529, and "of pervasive unequal treatment [of individuals with disabilities] in the administration of state services and programs, including systematic deprivations of fundamental rights," *id.* at 524. Of particular relevance here, *Lane* found that the record of "unconstitutional treatment of disabled persons by state agencies" included "unjustified commitment," and other abuses in the "state mental health" system. *Id.* at 524-525. This Court further noted the specific congressional finding that unconstitutional treatment "persists" in such areas as "institutionalization." *Id.* at 529 (quoting 42 U.S.C. 12101(a)(3)). The Court accordingly held in *Lane* that it is "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation" under Congress's Section 5 power. *Id.* at

529. *Alsbrook*'s holding—reaffirmed by the court of appeals in this case, Pet. App. 6a—that Congress lacked a basis for exercising its Section 5 power to enact Title II is irreconcilable with that key underpinning of *Lane*.

Finally, respondent Nebraska Department of Health and Human Services Finance and Support makes no effort to defend the court of appeals' violation of established principles of constitutional avoidance, which are at their apex when the Court addresses the constitutionality of an Act of Congress. See Pet. 9-10; cf. *Ayotte* v. *Planned Parenthood*, 126 S. Ct. 961, 967-968 (2006) (courts should address and remedy statutory violations of the Constitution on the narrowest ground possible). *Georgia*'s carefully measured and narrow approach to the constitutionality of Title II reconfirms what *Lane* already made plain: the Eleventh Amendment is no exception to that rule. See *Georgia*, 126 S. Ct. at 881-882; *Lane*, 541 U.S. at 530-531 & n.19; see also *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 360 n.1 (2001).

3. Accordingly, the court of appeals' decision conflicts with this Court's decisions in *Georgia* and *Lane* on multiple grounds. The necessity for this Court's review is underscored, moreover, by a recent decision of the Eighth Circuit. In *Klingler* v. *Director, Missouri Department of Revenue*, 366 F.3d 614 (2004), the Eighth Circuit dismissed on Eleventh Amendment grounds a Title II claim that implicated the right to travel and equal access to governmental services and programs. There, as here, the court of appeals held that Title II as a whole was invalid based on *Alsbrook*. See *id.* at 616-617. This Court subsequently vacated that judgment and remanded for reconsideration of the decision in light of *Lane*. See *Klingler* v. *Director, Mo. Dep't of Revenue*,

125 S. Ct. 2899 (2005). However, just days after this Court's decision in *Georgia*, the Eighth Circuit declined to reconsider its decision in *Klingler*, notwithstanding this Court's remand for precisely that purpose, because of the court of appeals' decision in this case. See *Klingler* v. *Director, Mo. Dep't of Revenue*, 433 F.3d 1078, 1082 (Jan. 17, 2006). Vacatur of the court's decision in this case thus is necessary to allow the Eighth Circuit the opportunity to bring its caselaw into line with this Court's decisions in both *Georgia* and *Lane*.

Because the court of appeals' decision in this case is wrong for reasons that have already been resolved in *Lane* and that were just recently reaffirmed in *Georgia*, the appropriate course at this juncture is to grant the petition for a writ of certiorari, vacate the judgment below, and remand for reconsideration of the court of appeals' sweeping invalidation of Title II in a manner that is consistent with and adheres to the framework for constitutional analysis established by this Court's decision in *Lane* and reaffirmed in *Georgia*.

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted, the court of appeals' judgment vacated, and the case remanded for further consideration consistent with this Court's decisions in *United States* v. *Georgia*, 126 S. Ct. 877 (2006), and *Tennessee* v. *Lane*, 541 U.S. 509 (2004).

Respectfully submitted.

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